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APPENDIX.

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## ANALYSIS OF INDIANA DRAINAGE ACT OF 1907.

Section 1 provides that the board of commissioners of each county shall appoint a citizen of the county as drainage commissioner. The county surveyor is named *ex officio* a second commissioner. Each is required to give a bond for the faithful discharge of his duties as drainage commissioner.

Section 2 provides that whenever the owners of tracts of land lying outside the corporate limits of a city shall desire to drain such tracts of land and such drainage cannot be accomplished in the best and cheapest manner without affecting the lands of others, such owners may apply for such drainage by petition filed in the Circuit or Superior Court of the county in which petitioners' lands are situated. Such petition shall describe the lands which will be affected by the proposed drainage and shall give the names of the owners thereof if known, or if not known, such fact shall be stated. The petition shall also state that in the opinion of petitioners the public health will be improved or that the proposed work will be of public utility, and it shall state generally the method by which it is believed such drainage can be accomplished most economically and the belief of petitioners that the expense of such drainage will be less than the benefits resulting to the owners of lands affected.

Section 3 provides that upon the filing of such petition in the office of the clerk of the court the petitioners shall fix a date for the docketing thereof and shall give notice thereof to all landowners mentioned in the petition. Such notice must be served upon such landowners



in person or by leaving a copy at his usual place of residence. As to nonresident landowners mentioned in the petition, notice must be given by posting notices in three places designated in the township in which such lands are situated and by sending a copy of such notice by mail to such nonresidents if their address can be ascertained, and also by causing publication of such notice. If such notice is given not less than 20 days before the date set for docketing the petition, the court orders the petition to be placed upon the docket as a pending action. Any person named in the petition as a landowner may file in court objections to the petition within 10 days after the date of such docket. After the expiration of the 10 days the court passes upon the objections and if it shall find the petition defective, it shall dismiss the same, unless amended, or if it deems the petition sufficient, it shall enter an order appointing a third drainage commissioner to act with the other two, and shall refer the petition to the three commissioners, and fix a time and place for the meeting of the commissioners and a time when they must report to the court. The commissioners must then make personal inspection of the lands described in the petition and of other lands likely to be affected by the proposed work. If they find that the drainage proposed is impracticable and will not improve the public health or benefit any public highway or be of public utility, or that the expense of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage, they shall so report their finding to the court and thereupon the petition shall be dismissed. If they find otherwise, they shall proceed and determine the best and cheapest method of drainage and the route and character of the proposed work and establish the same by

metes and bounds and shall estimate the cost thereof dividing the ditch into sections and shall assess the benefits or damages, as the case may be, to each separate tract of land to be affected, including easements held by corporations and any land, rights, easements or water power injuriously or beneficially affected, and shall report their findings to the court. The commissioners may determine what the method of drainage shall be—by removing obstructions from a natural or artificial watercourse or diverting such watercourse from its channel or by constructing an artificial channel or by various other means. In case any lands are named in the report as affected by the proposed work which are not named in the petition, the court shall fix a time for hearing the report upon notice to the owners of such lands.

Section 4 provides that upon the making of such report to the court any landowner affected by the work proposed and reported benefited or damaged may remonstrate against the report within 10 days after the filing thereof. Upon the hearing of the remonstrances the court may direct the commissioners to amend and perfect their report, or may refer the matter anew to the commissioners in case the report is defective; or the court may modify and equalize the assessments established in the report and for such purposes all persons whose lands are reported as affected or are stated in the petition as affected, shall be deemed to be in court by virtue of the notices previously given; or the court may confirm assessments stated in the report. If the court shall determine that it will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits, or that the proposed work will neither improve the public health nor bene-

fit any public highway nor be of public utility, or that the proposed work will not properly drain the land to be affected, the court shall order the proceedings to be dismissed. If the court shall approve the proposed work and shall be satisfied with the assessments therefor, or shall equalize the assessments to its satisfaction "it shall make an order declaring the proposed work established, and approving assessments as made by the commissioners, or as equalized and modified as above provided for, and shall assign the same to one of the three commissioners above provided for, for construction, or the court may assign it for construction to any disinterested freeholder of the county." All questions of fact arising on the petition, report or remonstrances, shall be tried by the court without a jury. The order of the court approving and confirming the assessments, and declaring the proposed work of drainage established, shall be final and conclusive, unless an appeal therefrom to the Supreme Court shall be taken within 30 days.

Section 5 provides that the commissioner charged with the execution of the work shall proceed to have the same constructed. He shall pay all expenses incident to such construction and costs of the proceeding. He shall pay all damages assessed and allowed by the court and the cost of constructing the work. He shall collect all assessments of benefits reported by the commissioners as adjusted by the court for the purpose of meeting the expenses of construction, apportioning such collections pro rata among the assessed property owners. He shall divide the work into sections and let the work of construction by public bidding. In case an assessed landowner shall become delinquent in his payments, the commissioner shall certify such fact to the county auditor, who shall cause same to be collected the

same as other delinquent state and county taxes are collected.

Section 5½ provides for the issuance of drainage bonds under certain conditions, but has no special bearing upon the issues in this case.

Section 6 provides that the filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein and not named in the original petition, and the amount of assessments when approved by the court shall be a lien upon the lands assessed. The construction commissioner shall record in the office of the recorder of each county where the lands are situated, a notice that the work has been established by the court and the respective assessments upon the lands affected.

Section 7 provides that the commissioner shall keep an accurate account of all work done and moneys collected by him and of all payments made on account of work. He must make a full report of the work to the court as often as once in six months, and the court shall allow him for his services a fixed amount per day for the time actually employed, subject to a maximum limitation. The construction commissioner "shall at all times be under the control and direction of the court, and shall obey such directions; and for failure so to do shall forfeit his compensation and be dealt with summarily as for contempt, and may also be removed from office by the court." The court may at any time direct another one of the commissioners to proceed with the construction of the work and may at any time discharge therefrom the commissioner appointed. Laborers and ma-

terialmen are given a lien upon the fund for the payment of their claims. And in case of any disagreement between the contractors or any such laborer or materialman claiming such lien, the court shall upon motion of the commissioner, the contractor or the person claiming such lien, determine such matter.

Section 8 provides that the act shall be liberally construed to promote the drainage and reclamation of overflowed lands, and the collection of assessments shall not be defeated because of any defect in the proceedings prior to the judgment establishing the ditch, but such judgment shall be conclusive that all prior proceedings were regular, and no person may take advantage of any error, defect or infirmity unless such person is directly affected thereby. Any person interested may file with the court a supplemental petition showing that lands not mentioned in the original report are affected by the proposed drainage, in which case the court shall require such person to give notice to the persons affected thereby and shall refer the petition to the drainage commissioners for a report and proceedings may thereafter be had thereon as if it were an original petition, but such proceedings shall not affect the original petition unless the court shall order the same consolidated and made a part thereof.

Section 8½ provides that whenever a ditch is to be constructed, widened, deepened, straightened or changed so near to the state line between the State of Indiana and any adjoining State that the work proposed to be done will affect lands in the adjoining State, the Board of Commissioners, or their proper officers, of the several counties in Indiana so adjoining such other State, shall have authority to join with the proper officers of the adjacent counties of such other State in such construction,

widening, deepening, straightening or otherwise changing such ditch. The Commissioners of the counties of this State are given power to enter into contracts jointly with the proper officers of the adjoining counties in the other States to construct, repair or improve any such ditch, each paying a proportionate part of the expenses thereof.

Section 9 provides for the payment by townships, towns and cities of assessments against highways, streets and other public places therein.

Sections 10 to 16, inclusive, provide for repairing and maintaining ditches when once constructed. The work generally is under the supervision of the Trustee of the Township in which the ditch is located. The county surveyor allots portions of the ditch to the property owners along the ditch who are required to keep the same clean and in repair. In case of their failure to do so the Township Trustee shall provide by contract to have the work done. If any landowner objects to his allotment he may appeal to the Circuit or Superior Court of the county and have his allotment reviewed.

Section 17 provides that when a proposed work of drainage, and the lands affected thereby, are located wholly within one county, the petitioning landowners may apply by petition to the Board of Commissioners of such county in like manner as hereinbefore provided with respect to an application to the Circuit or Superior Court of the county. Similar proceedings are then taken by the Board of County Commissioners as are taken by the court in other cases. Appeals may be taken from the decision of the Board of County Commissioners to the proper court of the county.

Section 18 requires a landowner adjoining a ditch to keep the operation of the ditch adjoining his land free

from obstructions caused by cattle or other stock on his land.

Section 19 provides that the owners of land adjoining a ditch upon applying by petition to the Circuit or Superior Court or the Board of Commissioners, as the case may be, may change the nature of the construction of the ditch by tiling or covering the ditch or by changing it in other respects. Similar proceedings are then taken as in the case of original construction, and the changes asked in the petition may be allowed by the court and made by the parties.

Section 20 provides that the repair of all ditches, other than dredge ditches, shall be under the supervision of the Township Trustees, provided, however, that upon petition of one-third of the persons whose lands are assessed upon any ditch the Township Trustees shall turn the work of repair and supervision over to the County Surveyor.

#### SYNOPSIS OF DECISIONS AND QUOTATIONS FROM OPINIONS.

##### *Prentis v. Atlantic Coast Line*, 211 U. S., 210.

In this case certain railroad corporations filed bills in equity in the federal court in Virginia to enjoin members of the Virginia State Corporation Commission from enforcing an order fixing passenger rates, on the ground that such rates were confiscatory and unconstitutional. The defendants argued that the proceedings before the Commission were proceedings in a court of the State, which could not be enjoined by a federal court under Section 720. This Court assumed for the purpose of its decision that the Commission was for some purposes a court within the meaning of Section 720, and in the commonly accepted sense of that word, and that it had been clothed by stat-

ute with legislative, judicial and executive powers. This Court further assumed, without deciding, that if the proceeding before the Commission against the railroad companies had been to enforce the Commission's order regulating rates and to punish the railroad companies for a breach of such order, then the Commission would be sitting as a court and would be protected from interference on the part of a federal court. This Court, however, held that the proceeding of the Commission in fixing passenger rates was *not judicial*, but was *legislative* in nature, and that such a proceeding was not a proceeding in a court within the meaning of Section 720, even though the general or dominant character of the Commission was judicial. In other words, this Court held that an act of a judicial body which was *legislative in nature* and which was unconstitutional could be enjoined by a federal court, and that such action by the court was not forbidden by Section 720. In delivering the opinion of the Court Mr. Justice Holmes said (pp. 225-7):

"In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. *Dreyer v. Illinois*, 187 U. S. 71, 83, 84; *Winchester & Strasburg R. R. Co. v. Commonwealth*, 106 Virginia, 264, 268. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their na-



ture, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth v. Atlantic Coast Line Ry. Co.*, 106 Virginia, 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others v. Commonwealth*, 106 Virginia, 264, 281. See further *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 440.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. Sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co. v. Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed *sub nom. McNeill v. Southern Ry. Co.* 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. Sec. 709, and Act of February 18, 1875, c. 80, 18 Stat. 318. See *Upshur County v. Rich*, 135 U. S. 467; *Wallace v. Adams*, 204 U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined

by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering v. Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called."

*Mississippi Railroad Commission v. Illinois Central Railroad Company*, 203 U. S., 335.

The Railroad Company filed a bill in the Circuit Court of the United States to enjoin the Railroad Commission of Mississippi from enforcing an order requiring it to stop certain of its trains at a small station upon its line. It was urged that

the Commission was a court and that under Section 720, a federal court could not enjoin its acts. In delivering the opinion of the Court Mr. Justice Peckham said (p. 341):

"It is also objected that an injunction will not lie from a United States court to stay proceedings in a state court, because of the provisions of Section 720, United States Revised Statutes. 1 Comp. Stat. 581. The commission is, however, not a court, and is a mere administrative agency of the State, as held by the Mississippi court. *Telegraph Co. v. Railroad Commission*, 74 Mississippi, 80."

*Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S., 298.

A bill was filed by the Railroad Company in the Circuit Court of the United States to enjoin the Railroad Commission of Kentucky from enforcing two orders of the Commission, one prescribing maximum rates, and the other awarding certain amounts in reparation for payments previously made to the Railroad Company for the transportation of merchandise in excess of rates previously established by the Commission. The lower court denied a motion for an interlocutory injunction. This Court affirmed the order of the lower court. It was contended that the act creating the Railroad Commission violated the State constitution by undertaking to confer judicial powers upon the Commission, whereas under the constitution judicial powers could be vested only in the courts of the state. This Court held that prescribing rates for the future was an act legislative and not judicial in kind. In the course of his opinion Mr. Justice Hughes said (p. 305):

"It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. *Interstate Commerce Commission v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499; *Mc-*

*Chord v. Louisville & Nashville R. R. Co.*, 183 U. S. 483, 495; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 8. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

And further (p. 307):

"The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and, it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether

other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. *It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'*” (Italics ours.)

*Southern Ry. Co. v. Greensboro Ice and Coal Co.*, 134 Fed., 82.

A bill was filed in the United States Circuit Court to enjoin the Commissioners of the North Carolina Corporation Commission and certain other parties from bringing suits for penalties and damages by reason of the refusal of the complainant to comply with certain orders of the Commission. It was contended that the proceedings of the Commission were court proceedings, and could not be enjoined by a federal court. Upon this point Purnell, District Judge, said (p. 94):

“True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a state court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this court as to state courts does not apply, *especially inasmuch as the acts complained of and asked to be enjoined are not judicial acts. As to these acts it is a state agency, not acting judicially.*” (Italics ours.)

The decision of the District Judge was affirmed by this Court in the case of *McNeill v. Southern Railway Co.*, 202 U. S., 543.

*Simon v. Southern Ry. Co.*, 236 U. S., 115.

One Simon obtained a judgment in a State court of Louisiana without notice to the Railway Company. The Railway Company thereupon filed its bill in the federal court to enjoin Simon from enforcing his judgment. This

Court held that Section 720 did not forbid a federal court from enjoining the execution of a void judgment. In delivering the opinion of the Court, Mr. Justice Lamar said (121-2):

“The primary question whether the United States court had jurisdiction of the case must of course be determined by considering the allegations of the Bill. It shows diversity of citizenship and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and *without notice* to the Railway Company. If that be so the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus *doubly void*. For even where there has been process and service, if the court ‘finds that the parties have been guilty of fraud in obtaining a judgment \* \* \* it will deprive them of the benefit of it.’ *McDaniel v. Traylor*, 196 U. S., 415, 423. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant ‘can no more be regarded as a party than any other member of the community.’ Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who if concerned in executing such judgments is considered in law as a mere trespasser. *Harris v. Hardeman*, 14 How. 339 (default judgment entered on improper service). *Williamson v. Berry*, 8 How. 541; *Scott v. McNeal*, 154 U. S., 46; *Western Indemnity Co. v. Rupp*, 235 U. S. 273.

On principle and authority, therefore, a judgment, obtained in a suit in which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief.”

And further (123-7):

“The Appellant, Simon, however, contends that even if there was equity in the bill; and even if the Railway Company could have brought a new and independent suit in the state court to enjoin him from using the judgment,—yet in the present case the

Federal Court was without power to afford the same relief because Sec. 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States court shall not 'stay proceedings in any court of a State.'

In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole v. Cunningham*, 133 U. S., 107. This, of course, often gave rise to irritating controversies between the courts themselves which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. *Diggs v. Wolcott*, 4 Cranch. 179, 180 (1807), and *Hull v. Burr*, 234 U. S. 712 (1914) (the first and last cases in this court dealing with that question), furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet Sec. 720 prevented the Federal court from staying the proceedings in the state court.

But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. In the nature of the case, however, there are few decisions dealing with such a question. For where the state court had jurisdiction of the person and subject matter the judgment rendered in the suit would be binding on the parties until reversed and there would, therefore, usually be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See *Marshall v. Holmes*, 141 U. S. 600, where *Nougue v. Clapp*, 101 U. S. 551, relied on by Appellant, is discussed.



There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in *Julian v. Central Trust Company*, 193 U. S. 112, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it may have been perfectly valid in itself.

Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use,—by so much the more can the Federal courts enjoin him from using that which purports to be a judgment but is, in fact, an absolute nullity. *Marshall v. Holmes*, 141 U. S. 597; *Gaines v. Fuentes*, 92 U. S. 10; *Barrow v. Hunton*, 99 U. S. 85.

That the United States Circuit Court here could enjoin Simon from enforcing a void judgment against the Southern Railway Company, has already been ruled in another branch of this very case. In *habeas corpus* proceedings (*Ex parte Simon*, 208 U. S. 144) he sought relief from the punishment imposed because of his violation of the temporary injunction granted in this cause. He there claimed that the attachment for contempt was void because the court was without power to issue the injunction which he had violated. On that subject this court said:

'This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. Sec. 720, forbidding United States courts to stay by injunction proceedings in any state court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in *Marshall v. Holmes*, 141 U. S. 589, and the earlier cases cited in that case.'



The appellant insists, however, that *Marshall v. Holmes*, referred to as conclusive unless overruled, does not support the jurisdiction of the Circuit Court because there no injunction was granted by the United States court.

In that case Mrs. Marshall brought a suit, in a Louisiana court, and obtained a temporary injunction restraining Holmes, Sheriff, from levying Mayer's judgments alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court where the temporary injunction was dissolved. That decree was affirmed by the Supreme Court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the Appellee contended that 'it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered.' In considering that contention (which is substantially the same as that urged by the Appellant Simon here), the court asked 'whether, where the requisite diversity of citizenship existed, the Circuit Court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court?' In answering this question the court pointed out the difference between enjoining a court and enjoining a party; and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the Circuit Court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgments if they were found to be fraudulent in fact, saying that the

'Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another juris-

diction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. "It would simply take from him the benefit of judgments obtained by fraud." And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.' "

*Hunt v. New York Cotton Exchange*, 205 U. S., 322.

One Hunt, a broker carrying on his business in Tennessee, was receiving quotations of the New York Cotton Exchange through the Western Union Telegraph Company under a contract with the Telegraph Company. The Exchange entered into an agreement with the Telegraph Company by the terms of which the Telegraph Company agreed not to furnish quotations to brokers who had not obtained quotation privileges from the Exchange. Pursuant to such agreement the Telegraph Company notified Hunt that it would discontinue furnishing him quotations, whereupon he filed a bill in the State court of Tennessee to compel the Telegraph Company to continue such service. While the proceeding was pending and an injunction had been issued restraining the Telegraph Company from discontinuing such service, the Exchange filed a bill in the federal court in Tennessee to enjoin him from receiving quotations of sales upon the Exchange. The case came before this Court on jurisdictional questions only, and this Court held that Section 720 did not forbid the federal

court enjoining Hunt from using such quotations, although there was then in the State court a proceeding under which he was given the right to use such quotations. This Court held that the case in the federal court was not the same as to parties or purposes as the case in the State court, and that the pendency of the suit in the State court did not deprive the federal court of jurisdiction.

In delivering the opinion of the Court Mr. Justice McKenna said (338-9):

'The next contention of appellant is that the court has no jurisdiction to grant the injunction and pronounce the decree appealed from. The only question involved in this branch of the case, appellant says, is 'whether it comes within the provision of the Revised Statutes, § 720, which is to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings of any court except in matters of bankruptcy.'

And appellant insists that this suit necessarily offends that section, because under its decree he 'cannot have the benefit of the judgment of the state court without being in contempt of the Federal court,' and that he is restrained by the Circuit Court from receiving from the Telegraph Company what the company is forbidden to refuse him by the state court. To sustain his contention appellant cites *United States v. Parkhurst Davis Mercantile Company*, 176 U. S. 317, and cases there referred to. Also *Diggs v. Woolford*, 4 Cranch, 179; *Watson v. Jones*, 13 Wall. 579; *Dyall v. Reynolds*, 96 U. S. 340; *Central &c. Bank v. Stevens*, 169 U. S. 433. These cases do not sustain his contention. In *Central Bank v. Stevens* it was decided that a state court had no power to enjoin a party whose rights had been adjudged by a Circuit Court of the United States from proceeding with a sale of property under a decree of that court. In the other cases cited, except *Watson v. Jones*, the purpose was to directly enjoin parties from proceeding in the state courts. In *Watson v. Jones* was considered what identity of

parties, rights and relief prayed for were necessary to enable the pendency of an action in one court to be pleaded in bar in another court, and it was said: 'The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.' The principle was also expressed in that case, and sustained by authorities, that the possession of property by one court cannot be interfered with by another, and, that 'The act of Congress of March 2, 1793 (now § 720 of the Revised Statutes of the United States) as construed in *Diggs v. Walcott*, 4 Cranch, 179, and *Peck v. Jenness*, 7 How. 625, are equally conclusive against any injunctions from the Circuit Court, forbidding the defendants in the case to take possession of property which an unexecuted decree of a state court required the marshal to deliver to them.' The case at bar has not that feature, nor has it identity with the case in the Chancery Court of Shelby County. Its parties and purposes are different. The pendency of a suit in a state court does not deprive a Federal court of jurisdiction. *Gordon v. Gilson*, 99 U. S. 168; *Insurance Co. v. Brines' Assignee*, 96 U. S. 588; *Stanton et al. v. Embrey, Administrator*, 93 U. S. 548; *Merritt v. American Barge Co.*, 79 Fed. Rep. 228; *Bank of Kentucky v. Stone*, 88 Fed. Rep. 383."

*Madisonville Traction Co. v. St. Bernard Mining Co.*,  
196 U. S., 239.

The Traction Company, a Kentucky corporation, began a proceeding in a State court of Kentucky to condemn for its use certain lands belonging to the Mining Company, a Delaware corporation. The Mining Company attempted to remove the case to the Circuit Court of the United States. The State court held that the case was not a removable one and, therefore, proceeded with the case. The Mining Company

thereupon filed a bill in the Circuit Court of the United States to enjoin the Traction Company from further prosecuting its suit in the State court. The Traction Company demurred to the bill. The Circuit Court overruled the demurrer and as the Traction Company elected to stand by its demurrer, a final decree was entered enjoining it from further prosecuting its case in the State court. Upon appeal this Court affirmed the decree of the Circuit Court. It was argued that the condemnation proceeding was of such nature that it could not be removed. This Court held that it was a controversy between citizens of different States and that the necessary jurisdictional amount was involved and that the case was removable. Mr. Justice Harlan, in delivering the opinion of this Court, cited an extract from a decision by Mr. Justice Brewer in *Colorado Midland Railway Co. v. Jones*, 20 Fed. 103, reading as follows (249):

*"I do not suppose that a State can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two States, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."*

Further in his opinion Mr. Justice Harlan said (252-4):

*"Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned*

and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States. 'A State cannot,' this court has said, 'tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.' *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

Now, it is true that the Circuit Court could not have the property in question condemned for local public purposes, if the State had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a state court the Federal court would proceed under the sanction of state legislation. It would enforce the state law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the Circuit Court could not enforce any other than the state law. It would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But at the same time it could enforce, as of course it must, the authority of the Supreme Law of the Land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different States, and which also, by statute, gives the Circuit Courts of the United States, without qualification, jurisdiction of such controversies. *A State cannot by any statutory provisions withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy.* Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated. If the judiciary act of Con-

gress admitted of the case in the County Court being brought within the original cognizance of the Circuit Court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves, in a National court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the state court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the State. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only \$100; whereas, the owner alleges that the amount awarded was grossly inadequate, practically confiscatory. That question, as well as the question whether the statute authorized the Traction Company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reason of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The Circuit Court, recognizing the right of the Traction Company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl v. United States*, 91 U. S. 367, 375; *United States v. Jones*, 109 U. S. 513, 519." (Italics ours.)



## CHAPTER 252.

AN ACT CONCERNING DRAINAGE, AND REPEALING LAWS  
IN CONFLICT.

[S. 214. Approved March 11, 1907.]

*Drainage—Commissioner—Appointment.*

SECTION 1. Drainage—Commissioner—Appointment.—*Be it enacted by the general assembly of the State of Indiana*, That it shall be the duty of the board of commissioners of each county in this state, at their first regular session in January after the taking effect of this act, to appoint a drainage commissioner, who shall be a person of intelligence and good judgment, and a reputable citizen of the county who shall hold his office for two years and until his successor shall be appointed and qualified, unless sooner removed by the board of commissioners. The board of commissioners may remove such drainage commissioner from office at any time, and whenever there shall be a vacancy in such office the board of commissioners may fill the same by appointment at any regular or special session of said board. Every such drainage commissioner shall, before entering upon the discharge of his duties, take and subscribe an oath of office, and shall give bond payable to the State of Indiana, with sureties and in a penalty of not less than five thousand dollars, to be filed with and approved by the auditor of such county, conditioned for the proper and faithful discharge of his duties, and that he will account according to law for all money that shall come to his hands as such commissioner. The auditor shall thereupon issue to such commissioner a certified copy of the order of his appointment. The county surveyor shall be ex officio a drainage commissioner, and shall give a bond as above required of the drainage commissioner in addition to his ordinary official bond. Such drainage commissioner provided for herein and the third commissioner appointed by the court shall each receive as compensation for all services provided for in this act three (\$3.00) dollars per day, and the surveyor shall receive four (\$4.00) dollars per day, each of them being paid for



the time he has actually engaged in the prosecution of the duties required herein.

*Petition—Contents—Bond.*

SEC. 2. *Petition—Contents—Bond.*—Whenever any owner or owners of any separate and distinct tract or tracts of land lying outside the corporate limits of any city or town in this state, or whenever a township trustee shall desire to provide for the drainage of a public highway or the grounds of a public school, or whenever the common council of any incorporated city or board of trustees of any town shall find it necessary for the successful drainage of any such lands, public highway, grounds of a public school, incorporated city or town shall desire to drain the same and the drainage thereof can not be accomplished in the best and cheapest manner without affecting the lands of others such owner or owners, township trustee, common council or board of trustees, as the case may be, may apply for such drainage by petition filed in duplicate to the circuit court or superior court of the county in which the lands of the petitioner or petitioners are situated. The petition shall describe in tracts of forty acres according to fractions of government surveys, or less tracts when they exist, and in Clark's grant and the French grant, and all pre-emptions of Indian reservation in such tracts [as] are owned, the lands of others, which it is believed will be affected by the proposed drainage, and give the names of the owners thereof, if known, or upon diligent inquiry can be ascertained, and if unknown shall so state. If the name of the owner is unknown and can not be ascertained on diligent inquiry it shall be sufficient to describe such land as belonging to the person or party who appears to be the owner by the last tax duplicate or record of transfers kept by the auditor of the county in which such land is situated. If any of the lands to be benefited lie within the corporate limits of any city or town in this state, the same shall be described by lots and the numbers thereof as shown by the plat books of such city or town. Such petition shall be sufficient to give the court jurisdiction over all lands described therein and power to fix a lien thereon, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the audi-

tor of the county where the same is situated. If the right of way of any railroad company is believed to be affected, it shall be sufficient to describe it as the right of way of such railroad company, naming it through section, township and range, giving the numbers of the same. It shall also state that in the opinion of the petitioners that the public health will be improved, or that one or more public highways of the county, or street or streets of, or within the corporate limits of a city or town, will be benefited by the proposed drainage, or that the proposed work will be of public utility; and it shall state generally the method by which it is believed such drainage can be accomplished in the cheapest and best manner, and the belief of the petitioners that the costs, damages and expenses of such drainage will be less than the benefits which will result to the owners of the lands likely to be benefited thereby. And all the assessments made upon the owners of such tracts, parcels and lots of lands as may be benefited by such drainage shall be in such equitable proportion as such drainage commissioners may deem just: *Provided, also*, That [at] the time of filing of said petition said petitioner or petitioners shall give a bond with good and sufficient freehold sureties, payable to the state, to be approved by the court, conditioned to pay all expenses in the event the court shall fail to establish said proposed drain: *Provided*, That when any such proposed drain will run into two or more counties, or on the county lines dividing two counties, the circuit court or the superior court of the county having the greatest length of said proposed ditch shall have jurisdiction of said work: *Provided*, That when said ditch, drain or levee extends into more than one county, one of the drainage commissioners herein provided for shall be appointed by the court from one of such other counties.

*Docketing—Notice—Third Commissioner—Objections—Proceedings.*

SEC. 3. Docketing—Notice—Third Commissioner—Objections—Proceedings.—Whenever the petitioner or petitioners shall file their petition in the clerk's office of the circuit or superior court, he or they shall fix or note thereon the day set for the docketing thereof and shall give the owner or occupant of each tract of land described in said petition, who is a resident of the county

or counties in which said land is situated, and to the trustee of the township, mayor of the city, president of the board of trustees of every town or city, and the agent of any railroad company or corporation or company, public or private, to be affected by the proposed work, notice thereof by serving upon such owner or occupant, persons or party, a written or printed notice setting forth the route of such drain as described in the petition, the fact of the filing and pendency of such petition, and when the same shall be docketed, which notice may be served by the petitioner or petitioners, or either of them, or by any person for them, by delivering a copy to the person to be notified, or by leaving such copy at his last and usual place of residence, and proof thereof made by the affidavit of the person making such service. The service of such notice upon the station agent of any railroad company in the county in which the proceedings are instituted shall be sufficient notice to such railroad company, and in case there be no agent of such railroad in the county, such company shall be notified in the same manner as other non-resident land owners, and as to all owners of lands to be affected by such proposed drainage, who at the time of filing the petition are nonresidents of the county or counties in which the lands to be affected are situated; notice of the filing, pendency, and the time fixed for docketing of said petition shall be given by posting up written or printed notices thereof at three public places in each township where the lands described in said petition are situated, and near the line of the proposed work, and one at the door of the court house in each of the counties in which said lands are situated, and by sending through the United States mail a copy of such notice to nonresidents, if their postoffice addresses can be ascertained by inquiry at the office of the county treasurer of the county, which notices shall be similar in form to those required to be served on resident owners; and by causing to be published for two times in each of the two leading newspapers representing the two political parties casting the largest number of votes at the last preceding state or general election, which said notice shall contain only the names of land owner or owners who are nonresidents of the county or whose residence can not be ascertained, but in all other respects shall be similar in form to those required to be served on resident land owners; and if it appears to the court

that notice has been given of the filing of said petition by service of notice upon resident land owners, and by posting and publication of notices as above provided not less than twenty days before the day set as the day for docketing the same, the court shall order the same placed on the docket of said court as an action pending therein. Any person named in such petition as the owner of lands shall have ten days, exclusive of Sunday, and the day for docketing such action after such docketing, to file with said court any demurrer, remonstrance or objection he may have to the form of said petition, or as to why said drainage commissioners, or either of them, on account of their interest in said work, or kinship to any person whose lands are affected thereby, should not act in the matter. After said ten days have elapsed, the court shall consider such remonstrance, demurrer or objection, if any, and, if it finds said petition defective, shall dismiss the same at the cost of the petitioner or petitioners, unless the same shall be amended within a time fixed by the court: *Provided*, That if within twenty (20) days, exclusive of Sundays, from the day set for the docketing of such petition, two-thirds in number of the land owners named as such in such petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioners: *Provided*, That in cases pending at the time of taking effect of this act where a two-thirds remonstrance has not been filed, such remonstrance may be filed to the report of the drainage commissioners, except in cases pending on petition filed under the act of the general assembly of the State of Indiana entitled "an act concerning drainage" approved March 6th, 1905. If no remonstrance shall be filed, and the court deems said petition sufficient, such court shall make an order referring the same to the drainage commissioners above provided for: *Provided*, That when such order shall be made referring such petition to the drainage commissioners, it shall be the duty of the court to appoint a third drainage commissioner to act therein, who shall be a reputable freeholder, not related to any land owner affected, disinterested, and a man of intelligence and good judgment, and a resident of some township through or into which such ditch or drain is pro-

posed to be constructed, who shall take an oath that he will faithfully and honestly perform his duties, before entering thereon; and it shall be the duty of the petitioners, at their own cost, to give notice to such person of such appointment. All objections to the petition or the acting of any drainage commissioner not made within said ten days shall be deemed waived. In the order of referring said matter to said commissioners, the court shall fix a time and place for the meeting of said commissioners, and a time when they shall report. The clerk shall deliver to them a duplicate copy of such petition and of such order, and they shall meet accordingly. They shall make personal inspection of the lands described in the petition, and of all other lands likely to be affected by the proposed work; and consider: First, whether the drainage proposed is practicable; second, whether, when accomplished, it will improve the public health or benefit any public highway in the county or street of a town or city, or be of public utility; and third, whether the costs, damages and expenses of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage. If they find any of these inquiries in the negative, they shall make report of such finding to the court, and thereupon the petition shall be dismissed at the cost of the petitioners. But if they find otherwise, they shall proceed and definitely determine the best and cheapest method of drainage, the termini and route, location and character of the proposed work, and fix the same by metes and bounds, courses and distance and description, including grades and bench marks, including all necessary arms, estimate the cost thereof, divide the drain or ditch into sections not more than one hundred feet in length, and compute and set out the number of cubic yards of excavation in each section, assess the benefits or damages as the case may be to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns, or other public or private corporations, including any land, rights, easements or water power injuriously or beneficially affected and to make report to the court, under oath, as directed: *Provided, also,* That when any ditch, drain, or levee, runs into another county than the one where such proceeding therefor as aforesaid are instituted, no bridge, culvert, or road in such other county shall be destroyed, injured or

interfered with, unless the damage to be occasioned thereby to such bridge, culvert or road has been considered, estimated and assessed by the said drainage commission, and the payment of such damages to such county provided for by assessing the same pro rata as other damages are assessed. The drainage commissioners, in locating the line or lines of work of drainage, may vary from the line described in the petition as they deem best and may fix the beginning or outlet so as to secure the best results; they may run the line so as to avoid all injury possible to lands, easements or public grounds and so as to benefit public highways, streets or alleys, by using the earth excavated for road beds, or in any other way they deem best: *Provided*, That in no case shall they change or construct the work as to sacrifice the best interests of such work or drainage. They may determine that the method of drainage shall be by removing obstructions from a natural or artificial watercourse; or diverting such watercourse from its channel, by deepening, widening or changing the channel of such watercourse; by constructing an artificial channel, with or without arms or branches; by providing that said work may be the tiling of an already existing public open drain or tiling an already existing public open drain and constructing as a part of said work a new drain; by providing that such drain shall be open or tiled and covered, or partly opened and partly tiled and dug by shovel, dredge or otherwise; by constructing levees or dykes; or by any or all of such methods combined: *Provided*, That all timber, shrubs and trees standing within twenty-five feet of any tiled part of any public drain, or of any public tile drain shall be removed by the owner of the lands on which such timber, shrubs and trees are located: *Provided*, That such drain shall not be located so close to any lake covering ten acres or more of ground as to lower the water level of the lake, and shall at no point be nearer than forty rods to the high water mark of such lake. "Excepting only where such drains empty into such lakes." Any two of such commissioners may act without the presence or concurrence of the third. The county surveyor shall be the engineer, if entirely disinterested and competent; otherwise the court shall appoint a disinterested and competent engineer who shall make the necessary surveys, and shall preserve in his office and

shall turn over to his successor legible copies of all notes made by him in the discharge of his duties: *Provided*, That in case the county surveyor shall not be a civil engineer or is incompetent, or shall fail to give the bond required, the court may designate some competent civil engineer to act instead of the surveyor, who shall, before entering upon his duties, take and subscribe an oath of office, and give bond as herein required of the county surveyor: *And, provided further*, That in all cases where lands are named in said report as affected by such proposed work, which are not named in the petition, the court shall fix a time for hearing the report, and it shall be the duty of the petitioners, at their own cost, to give ten days' notice to the owners of such lands of the filing of such report in the same manner as is herein required to be given of the filing and docketing of the petition, which notice shall state the time for hearing such report, and in such case the court shall continue the hearing of said entire report until such notice has been given as last above provided. The same proceedings shall be had in regard to such report as if all the lands mentioned therein, and the owners thereof, had been named in the original notice of the filing of the petition, and in locating and fixing the size and dimension of drains and ditches, they shall provide ample means for the drainage or protection from overflow of the land to be affected, having in view future contingencies, as well as the present. The drainage commissioners shall include in their report an itemized account of the costs and expenses incurred in making the survey and assessments, and the completing and filing of their report.

*Remonstrance—Damages—Assessments—Trial—Order.*

SEC. 4. Remonstrance—Damages—Assessments—Trial—Order.—Upon the making of such report to the court, ten days, exclusive of the day of filing such report and Sundays, shall be allowed to any owner of lands affected by the work proposed and reported benefited or damaged, to remonstrate against the report; the remonstrance shall be verified by the owner of the land or by some person on his or her behalf, and may be for any of the following causes:

First. That the report of the commissioners is not according to law.

Second. By any person or persons whose lands are



assessed as benefited, that the damages assessed to any specified tract of land are exorbitant.

Third. By any person or persons whose lands are assessed as benefited, that his or their specified lands are assessed too much as compared with other lands assessed as benefited or damaged, specifying the same.

Fourth. By any person or persons whose lands are assessed as benefited, that other tracts, specifying the same, are assessed too low according to the benefits to be received.

Fifth. By any person whose lands are assessed as benefited, that the same will not be affected, nor benefited to the extent of the assessment by the proposed work if accomplished.

Sixth. By any person whose lands are assessed as damaged, that the damages assessed are inadequate.

Seventh. By any person whose lands are reported as benefited, that his lands will be damaged by the construction of the proposed work.

Eighth. That it will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits.

Ninth. That the proposed work will neither improve the public health nor benefit any public highway of the county, nor be of public utility.

Tenth. That the proposed work as decided upon and reported by the commissioners, will not be sufficient to properly drain the land to be affected, and the filing of such remonstrance in the office of the clerk of such circuit court shall be a sufficient filing thereof under this act whether in term time or vacation.

If, upon hearing, the court shall decide that the first of the above causes of remonstrance is true, the court may direct the commissioners to amend and perfect their report, or the court may in its discretion set aside said report, refer the matter anew back to said commissioners for a new report. In making such order for a new report, the court shall fix the time and place of their meeting, and when they shall report; and when said new report is made and filed, any person whose lands are reported as affected may remonstrate within the same time therefrom and for the same causes as is hereby allowed to remonstrate against the first report, but such second remonstrance shall only be as to new matters contained in the second, or amended report. All questions of



facts arising on the petition, report or remonstrance, shall be tried by the court without a jury. If the remonstrance or remonstrances shall be sustained by the court on the second, third, fourth, fifth, sixth or seventh causes of remonstrance, the court may modify and equalize the assessments as justice may require by diminishing the assessments on some tracts and increasing it on others, or by giving or withholding damages, and for such purposes all persons whose lands are reported as affected, or are stated in the petition as affected, shall be deemed to be in court, by virtue of the notices originally given to such parties of the pendency of the petition, or by the notices subsequently given to the owners of lands which were not in the original petition, but brought in by the action of the commissioners; and if lands described in the petition as affected by the proposed work, and the commissioners have reported such lands as neither benefited nor damaged, the court may, if the facts and justice shall warrant it, make assessments against the same, and as such assessments are so changed, modified and equalized, or made, they shall stand and be adjudged valid. If the finding and judgment of the court be against the remonstrance or remonstrances on the second, third, fourth, fifth, sixth and seventh causes as above set out, the assessments made by the commissioners shall be confirmed, and the order of confirming shall be final and conclusive. If the finding and judgment of the court be in support of the remonstrance or remonstrances on the eighth, ninth or tenth causes of remonstrance, the proceedings shall be dismissed, at the cost of the petitioners, including the costs and per diem of the commissioners, reasonable fees for the services of petitioners' attorneys, all court costs and the costs of the trial of the remonstrances. If there be no remonstrance, or, if the finding and judgment shall be in all respects against the remonstrance for the first, eighth, ninth and tenth causes of the remonstrance, or if for the second, third, fourth, fifth, sixth or seventh causes of remonstrance, the court can and does equalize the same as above provided, the court shall make an order declaring the proposed work established, and approving assessments as made by the commissioners, or as equalized and modified as above provided for, and shall assign the same to one of the three commissioners above provided for, for construction, or the court may assign it for construction to any disinterested freeholder of the

county, who shall, before entering upon his duties, take and subscribe an oath of office, and give bond, payable to the State of Indiana, in such sum as the court may require, conditioned that he will honestly and faithfully perform his duties and account for all moneys that may come into his hands. When the finding and judgment of the court is against the remonstrance for any cause, or when in his, her or their favor on the second, third, fourth, fifth, sixth or seventh causes, and the assessments or benefits or damages to the person remonstrating is not changed ten per cent. in favor of the remonstrant, he shall pay the costs occasioned by his remonstrance, and in all other cases the costs shall be paid by the petitioner. In all cases of appeal tried in the circuit court, and in all trials in that court, provided for in this act, the trial shall be by the court, without a jury. There shall be no change of venue from the county. The order of the court approving and confirming the assessments, and declaring the proposed work of drainage established shall be final and conclusive, unless an appeal therefrom to the supreme court be taken and an appeal bond filed within thirty days, to the approval of the court or the clerk in vacation. A transcript of the record on such appeal and all bills of exceptions shall be filed in the office of the clerk of the supreme court within sixty days after the filing of the appeal bond. All parties shall take notice of, and be bound by such appeal, and all proceedings in the matter of such drainage shall be stayed until its determination.

#### *Constructing Drain—Collecting Assessments.*

SEC. 5. Constructing Drain—Collecting Assessments.—The commissioner or other person charged with the execution of the work, as above provided for, shall proceed to have the same constructed. He shall pay the costs not otherwise adjudged and all expenses incident to the construction of such work, including reasonable attorney's fees of the petitioner in the preparation and presentation of the petition, and the prosecution of the same and for such services as may be necessary in any stage of the proceedings not exceeding four per cent. of the assessed benefits as approved by the court in all drains in which the assessed benefits are greater than one thousand dollars (\$1,000), the costs of giving notice, and shall pay such other costs and expenses as the court shall

deem proper out of the funds collected from the assessments made and confirmed as aforesaid: *Provided*, That no claim for costs, expenses or otherwise, except on contract for constructing the work, shall be paid until it is presented to the court, and by the court allowed. He shall pay into the county treasury, as soon as he may collect from the assessments sufficient for the purpose, whatever that sum shall have been by the provisions of this law paid out of the county treasury on account of such work. He shall also pay all damages that have been assessed and allowed by the court and the cost of constructing the work. He shall, for the purpose of raising funds for the above mentioned purposes, collect pro rata of the assessments of benefits reported by the drainage commissioners, and as adjusted by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract, and not to exceed its pro rata share where the total amount of all assessments is not required for such payments, and require the same to be paid in installments not exceeding ten per cent. per month, at such times as he shall fix after thirty days' notice thereof, by one publication in a newspaper published in the county in which such lands are located, which notice shall state when and where all such installments shall be payable. He shall divide such work into stations not exceeding one hundred feet in length, and provide himself with and furnish on demand to any person interested or to any one proposing to bid on such work, the computation of the number of cubic yards of excavation in each station as is above provided for; and shall, after giving notice for two weeks in a newspaper of general circulation in each county where lands assessed as benefited are situated, proceed to let such work by contract to the lowest and best bidder. He may let the work as a whole, or subdivide the same into two or more sections and let the same in separate contracts, as will in his best judgment the most speedily and economically accomplish its completion: *Provided*, That any person, against whose lands assessments of benefits have been made, shall have the preference, at the same rate, over any other contractor. Such contractor shall, within the time, which shall be reasonable, and which, for good cause, may be extended under the direction of the person charged with the construction of such work, construct such part of such work so

set off to him: *Provided*, That should any such person fail or refuse to construct such portion of said work so contracted to him within the time according to the specifications, and should it become manifest, before the expiration of such time, that such person would not complete the same, or would be unable to complete the same within the time limited, or in the manner specified, then the person charged with the construction of such work may annul such contract and let the same to the best bidder, first giving ten days' notice by the publication in a newspaper published in the county in which that part of such work lies: *Provided*, Such person so in default shall not again become a bidder for such portion of such work, but such person shall be allowed on his contract a fair price for the work he has performed up to the time his contract is so annulled, such price to be determined by the court establishing said work. If such person to whom an allotment of work is contracted, be the owner of lands assessed for benefits, and shall perform his work within the time specified, the price thereof shall be applied on his assessment, and the same shall not be collected of him as above provided: *Provided, further*, That any person or party who shall have successfully bid for the whole or any part of said work, shall, when the same is so set off to him, enter into a contract with the person in charge to perform such part of such work and give bond and surety, and in a proper penalty, for the performance of his contract, and that he will pay all damages occasioned by his nonfulfillment of his said contract, which may be recovered in any court of competent jurisdiction. And in case any person or party whose lands are assessed for the construction of such ditch shall be damaged by reason of such default and failure of such contractor to complete the work within the time limited, such contractor so in default shall be liable on his bond to the person or party so damaged to the full amount of such damages, which may be recovered in any court of competent jurisdiction in a suit or an action on such bond by the State of Indiana on the relation of the person or party damaged for the use of such person or party injured or damaged, and the amount recovered shall be paid to the party injured, and such superintendent of construction may bring suit on such bond in any court of competent jurisdiction to recover any increase cost, expense or damages of or to the work

by reason of such failure of such contractor, and the amount recovered shall be and become a part of the funds in the hands of such superintendent, for the construction of such work, the same as assessments. He shall collect the assessments not satisfied, as herein provided for, or such part thereof as may be by him deemed necessary for the purposes herein mentioned, and apply the same as herein provided, and for the purpose of making such collections, if not paid as above required, he shall make his certificate, showing the amount of such assessments against any tract or tracts of land, the default in its payment as required, and file the same with the auditor of the county where such lands are situated, and thereupon the auditor shall place the same on the delinquent tax duplicate, and the same shall be collected as other delinquent state and county taxes are collected: *Provided*, Personal property or real estate other than that assessed as benefited, shall not be sold therefor: *Provided*, That in all sales of real estate made by the treasurer of any county under the provisions of this act, the owner thereof, or any person having an interest therein or lien thereon, at the time of sale, shall have the right to redeem the same at any time within two years from the date of sale, by paying into the county treasury, for the benefit of the purchaser at such sale, the amount for which said land was sold, together with a penalty of fifteen per centum per annum for such time as may have elapsed from the date of sale until the time of such redemption. But in no event shall the total compensation of such surveyor and his necessary assistants, be greater than a sum equal to four (4) per cent. of the actual cost of excavation of any drain whose total cost of excavation shall exceed three thousand dollars (\$3,000). Such, and any and all bills for services of such surveyor and his assistants shall be first approved and allowed by the judge of the circuit court of the county where such proceedings shall have been commenced, and shall be paid out of the fund raised for the construction of such ditch and not otherwise.

*Drainage Bonds—Request—Agreement—Assessment.*

SEC. 5½. In all cases where the contract price for the construction of any work of drainage, as provided for in this act, shall exceed the sum of five thousand dollars, drainage bonds may be issued to procure funds for the

payment of the costs of such construction, provided the owners of two-thirds in acreage of the lands assessed for benefits shall within sixty days from the establishment of the work and approval of the assessments of benefits and damages file their written request therefor with the superintendent of construction. In such written request such land owners shall agree that in consideration of the right to pay his assessment in ten yearly installments, he will not make any objection to any illegality or irregularity, if any, in the proceedings up to, and including the letting of the contract and the issuing of such bonds and he will pay such assessments with interest as the same become due. The filing of such requests and the issue of bonds, if any there should be, shall in no manner affect the collection of assessment from land owners and others assessed for benefits who have not filed requests for the issue of bonds, and as to them the collection of assessments provided for in the last section shall be made as if no bonds were issued; and bonds shall be issued to cover only so much of the cost of the work as is apportioned to the lands of those who have filed requests therefor, and shall be liens only on such lands and payable only out of the assessments made thereon. Such apportionment shall be made as follows: The superintendent of construction shall carefully ascertain the total original cost of the work of drainage including all damages awarded to the owners of lands and all incidental expenses and shall apportion such total cost and expenses to the several tracts of land and parties assessed for benefits in proportion to the assessments for benefits not in any case exceeding such benefits. Thereupon, the superintendent shall report all such facts to the court in term time or the judge thereof in vacation; together with all such requests for bonds and waivers of irregularities by land owners, which report the court or judge shall examine, and, if found correct, shall approve, whereupon such report and requests and waivers, with such approval, shall be entered in full in the order book of the court, and a certified copy of such entry shall be made by the clerk and delivered to the auditor of each county in which lands are located for which the owners have requested the issue of bonds, which certified copies shall be filed by such auditors and laid before their respective boards of commissioners, at such ensuing session. Each board of commissioners, at such ensuing monthly session



after filing of such transcript, shall direct the county auditor to prepare an assessment sheet or drainage duplicate showing the total amount of costs apportioned to all the parcels of land for which the owners request the issue of bonds, with proper columns for the payment of installments and interest. And such auditor shall assess ratably from year to year upon such lands a sum sufficient to pay such bonds and interest as they severally mature. The first of such assessments shall be due and payable at the semi-annual payment of taxes next following the letting of the contract, and the remaining assessments on the same day each year thereafter for nine successive years, with interest at six per cent. per annum, payable semi-annually, on all unpaid assessments. Such assessments and interest shall be collected by the county treasurer as state and county taxes are collected, and shall be subject to the same penalties in case of nonpayment when due; and all laws for the collection of delinquent taxes and for the sale of lands for taxes and redemption from sale shall apply equally to the collection of such assessments. Any land owner desiring to relieve his lands of the lien of such costs of drainage, may at any time pay the whole amount of unpaid installments with all interest to accrue thereon until the maturity of such bonds respectively. The treasurer shall receipt for any payment on such installments and mark such payment on the duplicate, as in the case of payment of taxes; and any such payment shall be a release of the lien of such cost and of the assessment for such drainage to the extent of such payment. As soon as such drainage duplicate is so prepared, the board of county commissioners of each county shall issue the bonds of the county to the amount of the cost of drainage so placed upon the duplicate for collection in such county. The bonds shall be numbered consecutively and shall be in denominations of one hundred dollars or any multiple thereof, except that one bond may be for less than one hundred dollars. One-tenth of such bonds as near as may be, shall fall due and be payable on the first day of June or December, as the case may be, following the next succeeding semi-annual payment of taxes, and one-tenth of such bonds, as near as may be, shall fall due on the same day every year thereafter, for nine successive years. All such bonds shall bear interest from the date of letting the contract for such drainage until the bonds

are paid, respectively, at six per cent per annum, payable semi-annually on the first day of June and the first day of December each year. They shall show on their face for what purpose they are issued, and shall be payable out of collections made on such bonded assessments and not otherwise. Upon the signing of such bonds by the county commissioners and attestation thereof by the county auditor, they shall be turned over to the county treasurer, who shall receipt to the auditor therefor. Thereupon, the treasurer shall give notice by publication once in a newspaper of general circulation published in the county, and by posting a copy of such notice at the door of the court house, that at the office of such county treasurer, on and after the hour of ten o'clock a. m. on a day to be named not less than twenty days thereafter, the treasurer will proceed to sell such bonds at not less than their par value to the highest and best bidder for cash: *Provided, however,* That in lieu of selling such bonds, as herein provided, the county commissioners by order of record to that effect, may direct that the bonds shall be exchanged at par and held by the county treasurer for any unloaned school funds as other unused funds held in the county treasurer [treasury]; in which case, the assessment and interest collected for the payment of such bonds shall be paid into and credited to the fund so used in their purchase. The proceeds of such bonds shall be drawn out of the county treasurer [treasury] only on the warrant of the auditor upon the certificate of such drainage commissioner in payment of the costs of construction and expenses incident thereto. In case the bonds sell at a premium, the aggregate amount of such premium shall be apportioned pro rata to the several assessments which are bonded and the amount thus apportioned to each parcel shall operate as a payment to that extent of the first maturing installment.

*Lien—Notice—Recording—Satisfaction.*

SEC. 6. Lien—Notice—Recording—Satisfaction.—The filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners locating the work and fixing the amount of assessments shall be deemed notice of the pendency of the proceedings to all persons whose lands are named



therein and not named in the original petition, and the amount of the so assessed from the time the same are approved and con-assessments as made or approved and confirmed by the court, shall be a lien first and paramount upon the lands firmed. The commissioners charged with the construction of the work shall, as soon as may be after he has been directed to construct the work, make out a notice wherein he shall state that the work has been established by the court; also the several assessments to the several tracts of land as the same have been finally confirmed by the court, and cause the same to be recorded in the office of the recorder of each county where any such lands may be situated. Whenever the assessments against any tract of land shall have been paid in money, or satisfied by the construction of a portion of said work as in [is] provided for in section 5 of this act, it shall be the duty of the commissioner or person charged with the construction of such work, within thirty days from the time of such payment or satisfaction, to enter satisfaction of such lien upon the margin of the page where such assessments are recorded, or if this be impracticable for want of room, then on some other page of the same or other record, reference being made thereto by marginal note on the page where such assessment is recorded. This provision shall apply to all drainage commissioners appointed under this act, and also to all commissioners of drainage in charge of work established under any former law of this state.

*Account—Report—Suits—Liens—Compensation.*

SEC. 7. Account—Report—Suits—Liens.—Such commissioners shall keep an accurate account of all work or material received or moneys collected by him on account of any and all assessments, and of all payments made on account of the work intrusted to him, and shall take vouchers for such payment. He shall also keep an exact account of the time occupied by him in the performance of his duties. Whenever he shall be engaged on two or more works on the same day, he shall divide such day among them in proportion to the time devoted to each. He shall as often as once in six months make a full report of such matters under oath, to the court; and the court shall allow him for his services not exceeding three dollars per day for the time actually and necessarily employed; but in no event shall the compensation paid to

such drainage commissioner be greater than a sum equal to three per cent. of the total cost of such excavation of such drain, except on drains where the total cost of excavation shall be less than three thousand (\$3,000) dollars; he shall at all times be under the control and direction of the court, and shall obey such directions; and for failure so to do shall forfeit his compensation and be dealt with summarily as for contempt, and may also be removed from office by the court. Suit may also be brought upon his bond in the name of the state, and the amount recovered shall be applied to the construction of the work. The court may at any time, when the occasion may require, direct another one of the commissioners to proceed with the construction of the work, and may at any time discharge therefrom the commissioner appointed thereto. All laborers and other persons who shall hereafter perform any labor or other service, or furnish board or any materials in the construction of any work under the provisions of this act shall have a lien upon the fund raised for the payment of the same; and upon notice in writing filed with the person whose duty it shall be to pay out such fund, of the amount due and what the same is for, such person shall withhold payment to the contractor for such work to an amount sufficient to satisfy such lien until the same is adjusted and paid; and in case of disagreement between the contractor and the person claiming such lien as to the amount or validity thereof, the court ordering the construction thereof shall, upon motion of the commissioner, the contractor, or the person claiming such lien, determine such matter; and upon failure to comply with the above provisions, such person in charge of such work shall be liable on his bond for the amount improperly paid over to such contractor: *And provided, further,* That none of the provisions of this act shall apply to proceedings instituted prior to the passage of this act.

*Act Construed—Supplemental Petition.*

SEC. 8. Act Construed—Supplemental Petition.—This act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands, and collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries, but such judgment

shall be conclusive and final, that all prior proceedings were regular and according to law, nor shall any person be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby. Any person interested may file with the court a supplemental petition showing that lands not mentioned in the original report are affected, as he believes, by such drainage, in which case the court shall require such person to give such notice as it may deem proper and sufficient to the persons affected thereby, and shall refer the same to the drainage commissioners for a report, and any and all proceedings may be had thereon, and orders and decrees made therein, the same as if it were an original petition, but the proceedings thereon shall not affect the original petition, unless the court shall, for good reason, order the same consolidated and made a part of the original petition, in which case the court may make such orders therein as are herein authorized.

#### *Drains on State Lines.*

SEC. 8½. Whenever it may be desirable to construct, widen, deepen, straighten or change any ditch, drain or water course lying on, along, across or near to the state line between the State of Indiana and any adjoining state, or whenever it may be desirable to construct, repair or improve any work of drainage as provided for in this act, which ditch, drain, water course or other work of drainage can not be constructed, repaired or improved in the best manner without affecting lands in such adjoining state, the boards of commissioners and other proper officers of the several counties in this state, so adjoining another state, shall have authority to join with the proper officers of such adjacent counties of other states in the construction, widening, deepening, straightening, repairing or improving of any such ditch, drain, water course, or other work of drainage. Such commissioners of such counties in this state are given powers jointly to enter into contracts with the proper officers of such counties in adjoining states to construct, repair or improve any such work of drainage, each to pay such proportion of the costs and expenses of the work as by the contracting officials shall be deemed just. Such work of drainage shall be made on petition of land owners or corporations as provided for in this act and this act so

far as applicable shall govern the commissioners and other officers of this state in relation to joint work of drainage, provided such adjoining county or counties in other states shall pay their proper share of necessary costs and expenses.

*Highways—Payment of Assessments.*

SEC. 9. Highways—Payment of Assessments.—Any benefits assessed to any highway shall be assessed against the proper township, and shall be paid by the trustee out of the township fund belonging to such township. Assessments on account of improvements to streets and alleys in incorporated towns or cities shall be against such towns or cities.

*Repairs—Obstructions—Township Trustee.*

SEC. 10. Repairs—Obstructions—Township Trustee.—That all ditches or drains that may have been, or may hereafter be, constructed under and by virtue of any law of this state, shall, except as hereinafter otherwise provided, after the allotment shall be made by the county surveyor as hereinafter provided, be under the charge and supervision of the trustee of the township in which the same are a part thereof, whose duty it shall be to see that the same are cleaned out and kept open and in proper repair, free from obstruction, so as to answer their purpose.

*Allotment—County Surveyor's Duties.*

SEC. 11. Allotment—County Surveyor's Duties.—As soon as practicable, after the passage of this act, it shall be the duty of the county surveyor in each county in this state in which any such ditch or drain, or part thereof, is located when ordered by the trustee of the township in which some part of such ditch is located, to proceed to view and examine each and every such ditch or drain within his respective county, except dredged ditches, and to fix and determine the portion thereof that the owner of each tract of land and each corporation, county or township assessed for the construction thereof should biennially clean out and keep in repair, and shall also at the same time set apart and apportion to each parcel of land, and to each corporate road or railroad, and to the township where public highways are benefited, a share or portion of such ditch or drain, according to the benefits to be received thereby, to be

cleaned out biennially and kept in repair by the owner of each tract of land, or by such corporate road or railroad, or by the township. Such surveyor shall, whenever practicable, locate such share or portion of such ditch upon such tract of land, or upon the right of way of such corporate road or railroad, or on the highway, on account of which such share is allotted to the township. In making such allotments such surveyor shall begin at the mouth of the ditch where he shall fix a permanent mark or monument of the place of beginning, and he shall also establish a permanent mark or monument at the upper end of each allotment, and give the location of each share, its number and length in feet, and a brief description of the manner in which the work shall be done. Each ditch or drain shall be cleaned out to a depth and width not less than its original specifications: *Provided*, That where ditches were originally allotted for construction by reviewers appointed by the board of county commissioners, under any former law, the allotments shall remain the same for repair under this act, unless a majority of the parties assessed shall petition the surveyor or the trustee shall request in writing a reapportionment under the provisions of this act, in which event the same proceedings shall be had as in other cases. The allotment shall describe the land in such tracts as may meet the convenience of owners, and in case of a subsequent subdivision of such tracts the allotment may be subdivided by contract, and the duties prescribed under this act pass to grantees: *Provided*, That where any person or persons shall have converted that portion of said ditch running through his or their lands or part thereof into a blind ditch by putting in drain tile of sufficient dimensions to serve the purpose of drainage, said drain tile so put in being continuous from the head or beginning of such ditch through the land of said owner or owners, and thus obviating the necessity of working that part of said ditch so tiled of said ditch on his or their lands, said tiling shall be taken in consideration in making said allotments, and the allotments herein provided shall be made among the land owners, roads or railroads only through whose lands such ditch is open; and where allotments have been made to include land or lands through which such blind ditch or tiling forms a part of said open ditch, the owner or owners receiving due credit for the allotments so tiled. The

owners of the land through which an open ditch runs shall remove all brush and weeds from the banks of that part of the ditch through the lands, owned by them respectively, during the month of July in each year; and shall be given credit for such work in making allotments for the repair of such ditches.

*Record of Allotments—Notice.*

SEC. 12. Record of Allotments—Notice.—Such surveyor shall reduce such allotments to writing, and after the same are finally fixed and established he shall record the same in a book to be kept for that purpose, and known as the drainage record. He shall thereupon cause to be posted up, for not less than ten days, in five public places in the township where lands are allotted a portion of said work, written or printed notices of the place where and the time when he will hear all objections that may be made to such allotments, which notice may be in substance as follows:

To whom it may concern:

You are hereby notified that I will be at my office on the ..... day of ....., 19..., at the hour of ....., and will then and there hear all objections that may be made to my allotment for cleaning out biennially and keeping in repair the ..... ditch, in ..... township, ..... county, Indiana, when and where you can appear and be heard if you see fit.

.....  
County Surveyor.

Dated this ..... day of ....., 19....

A copy of said notice shall also be sent by mail to the trustee of the township in which an allotment is made by reason of any highway, and to each individual whose lands are allotted portions of work, and to an officer of each corporation, and to a station agent of each railroad whom portions of said work has been allotted. Where the residence of any nonresident owner of such land is known to the surveyor, he shall send a copy of such notice by mail to such nonresident. If a nonresident owner of land have a known agent in the county a copy of said notice shall be mailed to such agent.

*Hearing Objections—Order.*

SEC. 13. Hearing Objections—Order.—Upon the day named in such notice such surveyor shall be present at the

time and place therein mentioned, and shall hear all objections made to such allotments, and shall have power to administer oaths to all persons examined before or by him. He may adjourn the hearing from day to day, or from time to time, as may be deemed necessary, until all objections are heard. All persons interested shall take notice of such adjournment without further notice. After hearing all objections that may be offered to such allotments, such surveyor shall confirm or change the same as justice may require, and shall enter an order accordingly, which shall be final and conclusive upon all parties interested, unless appealed from in ten days thereafter.

*Appeal—Notice—Costs.*

SEC. 14. *Appeal—Notice—Costs.*—Any person or corporation aggrieved may appeal from such order to the circuit or superior court of the county by filing with the clerk of said court, within ten days from the time of such order, an undertaking conditional that he will duly prosecute such appeal and pay all costs that may be adjudged against him on such appeal, such surety to be approved by said clerk; whereupon such clerk shall issue a notice in the nature of a summons to such surveyor, which shall be served by the sheriff of said county, and thereupon such surveyor shall file with such clerk a copy of the record of such allotments and the objection of the appellant thereto, which shall be all the proceedings necessary upon such appeal. All other persons interested shall take notice of such appeal, which shall be tried by the court. If the court reduce the allotment one-fifth in amount then all costs occasioned by such appeals shall be taxed against such surveyor, and paid out of the general funds in the county treasury not otherwise appropriated, otherwise the costs shall be adjudged against the appellant. If more than one person appeal separately the cases shall be consolidated and tried together. The court may confirm the allotment made by the surveyor or change the same, and its decision upon such appeal shall be final and conclusive. The surveyor shall receive for his actual services in allotting any such ditch for repairs four dollars per day and not to exceed two dollars per day for the services of each deputy surveyor, and the same rate for parts of days, to be paid out of any money in the county treasury not otherwise apportioned,



upon a report on oath filed with the county auditor, but in cases wherein it is necessary to employ a civil engineer to act in such capacity as a deputy surveyor, then such deputy shall be paid at the rate of not to exceed four dollars per day for the time actually employed: *Provided*, That the total amount to be allowed to such surveyor for the services of himself and his necessary assistants shall not exceed the sum of ten (\$10) dollars for each mile of any ditch or drain so allotted by him.

*Cleaning and Keeping in Repair—Trustee—Duties.*

SEC. 15. Cleaning and Keeping in Repair—Trustee Duties.—It shall be the duty of the township trustee to procure a transcript of the surveyor's record of allotments of ditches in his township as soon as practicable after the passage of this act or after the same has been made, and he shall biennially prior to the first day of August fix a time within which each allotment on every ditch shall be cleaned out and put in repair by the person whose duty it shall be to perform said work; in fixing such time for the cleaning out of such allotment such trustee shall begin with the allotment nearest to the mouth of any such ditch, and proceed in regular succession up stream to the beginning of such ditch. He shall notify owners of allotments in sections of not less than one mile in continuous length of the ditch to have their respective allotments cleaned and ready for inspection at one and the same time and may, in his discretion, notify a greater number, or even all the owners of allotments to be completed and ready for inspection on the same day, and any person who shall permit or allow any earth, sand or material from an uncleaned allotment to wash down, in or upon, or in any [way] fill or impair any allotment which is clean, shall remove the same at his own cost, and on failure so to do, the trustee shall cause the same to be removed at the cost of the party so in default and such trustee may recover such cost before a justice of the peace or any court of record in a suit brought by him against the person so in default, or he may certify the amount of such cost and expense to the auditor of the county, who shall place the same upon the next tax duplicate against the land of the party so in default and the same shall be collected the same as assessments are collected. He shall make a record of the time so fixed by him for the completion of each allot-



ment on every such ditch separately in a book provided for that purpose. That on or before a day fixed by said trustee for that purpose, the owner of the land allotted shall appear before the trustee and declare his intention to clean or repair his said allotment and shall execute and deliver to said trustee an undertaking in such sum as the trustee shall fix providing for the completion of said work within the time specified and according to the original specifications. That prior to the first day of August, of every second year in which such ditch is to be cleaned or repaired, notice shall be given to the owner or occupant of each tract of land on which allotments have been made, which notice may be served by the trustee or other competent person, or mailed to his address by registered letter. Such notice shall be sufficient if it name the ditch, the owner of the land, describe the allotment, specify the time within which the allotment shall be completed, and the time at which the owner shall appear and declare his intention to perform said work and file undertaking for the completion of the same. That immediately after the day fixed for the filing of the undertaking by the owner of the land allotted, said trustee shall give ten days' notice by posting three notices in five public places within the township, describing each allotment in which an undertaking by the owner has not been filed, and after ten days sell the same for construction to the best responsible bidder, taking bond from the contractor for the faithful performance and completion of said work: *Provided*, Said trustee may cause said allotments in which owner of land has not filed bond, completed without sale, where in his judgment it can be accomplished in a cheaper manner.

*Completion of Allotment—Failure—Costs.*

SEC. 16. It shall be the duty of every owner of land or corporation who has filed a written undertaking for the completion of any allotment, to perform the same within the time fixed, and on failure so to do the trustee shall proceed at once to have the same completed, and the costs thereof together with the costs for the completing of the other allotments including his own per diem certified to the auditor of the county, who shall place the same on the tax duplicate as other taxes against such person or corporation to be collected as other taxes are collected, and when collected the same to be paid over

to such trustee, or such trustee may recover such expenses and his fees before any justice of the peace of the township where the owner resides, or through or into which such road or railroad runs; or he may bring suit in the circuit court or superior court of the county to collect such expense and fees, and enforce and foreclose the lien on such land, township or railroad, and he may bring suit in the circuit or superior court of the county upon any undertaking or upon the bond of any contractor for any breach thereof, and the amount recovered shall be paid into the township fund of such township, and in all suits brought by the trustee under the provisions of this act such trustee shall also recover reasonable attorney fees and the judgment shall be without relief from valuation or appraisement laws: *Provided*, That prior to the first day of August, in any year, in which a ditch shall be cleaned, the trustee may by the assistance of a surveyor or otherwise ascertain the grade line and the cubic yards of earth to be removed, and when said work is completed said trustee may have the same accepted by a competent surveyor. And the service of the surveyor and giving of notice shall be paid by the township.

*Petition to County Commissioners—Proceedings.*

SEC. 17. *Petition to County Commissioners—Proceedings.*—When any proposed work of drainage and the lands, highways, easements, public grounds and cities, towns or townships to be affected thereby are wholly within one county the petitioner [or] petitioners for such drainage, instead of applying for the same to the circuit or superior court as provided for in this act, may apply thereto by petition to the board of commissioners of such county at any regular monthly session of such board, and all provisions hereinbefore made as to such petitions, notice of the hearing, demurrer, pleading or motion in relation thereto, hearing thereof, dismissal or amendment of the petition and references to the drainage commissioners, remonstrance and exceptions thereto and action and ruling therein; action on such report, allowance and payment of claims, and all other matter in relation to such work, shall be had and concluded as far as applicable by and under direction of such board of county commissioners, as hereinbefore in this act provided for in the circuit or superior court, except as provided for in this

section. Appeal from the action of the county board on the report of the drainage commissioners may be taken to the circuit or superior court of the county within the time and in the manner provided in case of appeal from the action of the circuit court or superior court to the supreme court, and a like appeal, taken within like time and in like manner, may be had to the supreme court from the decision of the circuit or superior court on the appeal from the board. The reports of the drainage commissioners shall be prima facie evidence of the facts stated in such reports, whether before the board of commissioners, in the circuit or superior court or the supreme court. The county auditor, in case of the filing of a petition for drainage before the county board, shall perform all the duties provided to be performed by the clerk of the circuit court and the board of commissioners, in case of the filing of such petition before the board, is given all the powers required to perform all the duties in regard to such work of drainage, so far as the same is applicable that have hereinbefore been prescribed for the circuit or superior court save and except such board shall have no jurisdiction over any work or drainage where any part thereof or any lands to be affected thereby are situated in another county: *Provided*, That when objections, demurrers, remonstrances, pleadings and reports are to be filed within certain fixed time, the same may be heard by the board at the next term of such commissioners' court. Whenever it shall appear by the statements in a petition for drainage filed under provisions of this section, that the same if constructed will not, with all its branches, exceed two miles in length, and will not cost to exceed three hundred dollars, exclusive of the tile that may be used therein, and that the surveyor of the county is not interested therein, or related to the parties likely to be affected thereby, the auditor of the county shall refer the same at once to the surveyor of the county, and it shall be his duty to investigate and report therein to the auditor of such county within thirty days, and in so doing he shall perform and have all the duties and powers granted by this act to engineers, drainage commissioners and viewers in drainage proceedings. Upon the filing of such report, the auditor shall issue a notice to each landowner named therein, in which he shall set forth in proper blanks:

First: A general description of the route of said ditch.

Second: The names of the land owners named therein.

Third: A general description of such owner's land and the amount such land is assessed for benefits or damages.

Fourth: The day when the same will be heard by the board of commissioners, which shall be at the next ditch day, by the rules of such board that it is not less than fifteen days after such report is filed with the auditor.

If the petitioner ask to serve such notices he may do so, but if he fails to call within three days after the filing of such report therefor or if he fails to serve the same, they shall be delivered to the sheriff of the county where such land owners reside, and such sheriff shall immediately serve the same as summons is served in civil actions, the cost thereof to be taxed to the petitioner as a part of the expense to be paid by him in said matter. Upon the day set for the hearing, if the board of commissioners find that all persons named in said report have been notified thereof more than ten days prior to such day, they shall proceed to hear the same, and in so doing shall have power to hear and determine said matter the same as is granted in such proceedings in the circuit court and make such changes in plan of said work and to change and modify the assessments of benefits and damages as is granted to said court in this act. And every land owner shall have the right, and it shall be his duty, to file such objection thereto as might or could be done in such proceedings in the other sections of this act. If any land owner shall be dissatisfied with the judgment of such board, he shall have the right to appeal therefrom in the same manner that appeals are taken from other decisions of such board; and the court to which such appeal is taken shall have the power to hear and determine such matters as if it originated in such court. At all of such hearings the report of the surveyor shall be evidence of the fact therein stated, and the burden of changing such report shall be upon the remonstrant. Such ditch shall be constructed and repaired in the same manner as in the act provided for the construction and repair of other ditches. If it shall appear to the board that notice has not been given to all persons affected as hereunto provided, the hearing

of such matter shall be continued till they have received notice when such matter shall be heard, and if it appears by affidavit at any time that any land owner is a non-resident of the state, or his residence is unknown, the auditor of said county shall give notice of such matter in the same way and for the same time that notices are given to nonresidents in civil actions in the circuit court.

### *Obstructions.*

SEC. 18. That the owner of inclosed land through which any allotted ditch may run, shall be liable to the trustee for any obstructions caused by cattle or stock, and upon notice from the trustee, the owner of said land shall immediately remove such obstruction, and if not so removed, the trustee shall have said ditch repaired, and may sue such owner in any court having jurisdiction, and collect all expenses incurred in making any such repair, provided such expenses shall include the reasonable attorney's fees.

### *Tiling or Change—Petition—Proceedings.*

SEC. 19. Should the owner of any land, or any corporation, affected by the construction, change, improvement or extension of any work of drainage under this or any former law of this state, be of the opinion that such work, or any part of it, may be more economically kept in repair, or may be made more efficient for its purpose, by tiling and covering; by removing tile and making the drain open; by changing the line of the drain or extending its length; or by making any other change in the work as originally constructed, such land owner or corporation may apply for such change, improvement or extension by filing a petition therefor with the circuit or superior court, or with the board of commissioners, as the case may be, of the county in which the proceedings were had for the construction of such work. The form and contents of such petition and other provisions in relation thereto shall, so far as applicable, be the same as provided in section two of this act for the original petition for the construction of the work; and the provisions of section three, as to notice and hearing of such petition or remonstrance thereto, reference thereof to the drainage commissioners; the provisions of sections three and four as to the report of the drainage commis-

sioners, exceptions thereto and action on such exceptions and on the report; and the provisions of section five and section seven as to the duties of the superintendent of construction, shall, so far as applicable, be the same in case of such change or improvement in such work of drainage as in case of the original construction of the work; and if such work of change or improvement is done under the direction of the circuit or superior court, and the total cost exceed five thousand dollars, the provisions of section six in relation to the issue of drainage bonds shall also apply. In all other respects the provisions of this act in relation to the construction of any work of drainage shall, so far as applicable, govern in the making of any such change, improvement or extension of any work constructed under this act or under any former drainage law of this state: *Provided*, That if the changes contemplated do not affect more than two miles of said ditch and will not cost to exceed three hundred dollars (\$300.00) exclusive of tile to be used therein, then all the procedure and provisions in relation thereto may be had in accordance with the provisions of section 17 of this act: *Provided, further*, That if the drain which it is proposed to change in accordance with the method of procedure laid down in said section 17 of this act, was originally established in the circuit or superior court, then the clerk of such court shall proceed in all ways as would the auditor of the county in carrying out the provisions prescribed for him in said section 17.

#### *When Surveyor May Repair.*

SEC. 20. The repair of all drains or ditches other than dredge ditches, shall be in the hands of the township trustees in whose townships such ditches or any part thereof may be situate: *Provided*, That when not less than one-third of the persons whose lands are assessed upon any ditch, shall petition the trustee of such township or townships, such trustee shall turn the work of repair and supervision of any ditch mentioned in such petition over to the county surveyor, who shall proceed to repair and clean such ditch in the same manner that such work would be done under the provisions hereof for the cleaning of such ditches by township trustees: *And, provided*, That when any such trustee shall fail to perform any duty provided for him in this act, he shall be

guilty of a misdemeanor, and may be fined in any sum not less than \$25 nor more than \$100, in any court of competent jurisdiction.

*Repeal—Exception.*

SEC. 21. All laws and parts of laws heretofore enacted in relation to drainage are hereby repealed: *Provided*, Any pending proceedings shall be continued under this act, except that all proceedings which shall have been commenced under and in accordance with an act entitled "An act concerning drainage," approved March 6, 1905, shall be concluded and determined in accordance with all of the provisions of said act.

*Fresh Water Lakes—Act Not Affected.*

SEC. 22. Nothing in this act shall be taken to affect or repeal any part of an act entitled "An act to preserve the fresh water lakes of the State of Indiana at their established level and protect them from danger of being injuriously affected or destroyed by the lowering of the water thereof and providing penalties for violation thereof, and declaring an emergency;" approved March 6, 1905, the same being chapter 152 of the acts of 1905, but that this act shall be considered supplemental thereto: *Provided*, That this act shall not repeal any law enacted by the session of 1907 of the general assembly of the State of Indiana, but shall be supplemental thereto.

